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October 26, 2020

**SUBMITTED VIA REGULATIONS.GOV**

The Honorable Eugene Scalia  
Secretary of Labor  
U.S. Department of Labor  
200 Constitution Ave, NW  
Washington, DC 20210

**RE: RIN 1235-AA34: Independent Contractor Status under the Fair Labor Standards Act**

Dear Secretary Scalia:

We write regarding the U.S. Department of Labor's (DOL) September 25, 2020, notice of proposed rulemaking (NPRM) updating the standard for determining whether an individual is classified as an independent contractor or employee under the *Fair Labor Standards Act* (FLSA).<sup>1</sup> As the committee of jurisdiction over the FLSA, the Committee on Education and Labor (Committee) has examined this issue extensively under both Republican and Democrat leadership, and has held numerous hearings with testimony from a variety of stakeholders, including employers, workers, legal and human resource professionals, and academics. We support DOL's efforts to protect and enhance the independent contractor model. We appreciate that the September 25 NPRM is intended to create greater clarity for all stakeholders which will result in increased opportunity for workers and entrepreneurs and encourage even greater innovation in our economy.

**Worker Classification**

The successful and popular independent contractor model empowers individuals with flexibility and economic opportunity. However, the lack of an FLSA definition for the independent

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<sup>1</sup> Independent Contractor Status under the Fair Labor Standards Act, 85 Fed. Reg. 60,600 (proposed Sept. 25, 2020).

contractor classification and the ambiguous standard of economic dependency—the touchstone of the current independent contractor test used by employers, court systems, and other governmental bodies at all levels—have led to an inconsistent and confusing application of the FLSA that is harming workers, businesses, and consumers alike. For example, in 2019, Alexander J. Passantino, former Acting Administrator of the DOL’s Wage and Hour Division, testified before the Subcommittee on Workforce Protections about the challenges presented by this regulatory ambiguity:

The standard for determining whether a worker is an independent contractor or an employee under the FLSA is a seemingly constant moving target. We have had multiple pronouncements by the DOL over the past several years and we have had far more court decisions. Even when the factors that are considered are the same, the focus placed on those factors differs. Different courts considering the same exact business models have come to different conclusions based on their own understanding of the facts and their own understanding of the relative importance of those facts.<sup>2</sup>

The final rule issued by DOL should ensure that the independent contractor standard provides additional clarity while also accounting for real-world implications for a diverse range of stakeholders, from traditional contractors to the sharing economy.

### **Worker Flexibility and Independence**

Equally as important as the clarity that will be provided by a final rule is the recognition of and respect for workers’ desires for flexibility and independence in the modern economy. As has been demonstrated in actual practice, academic studies, and in testimony before the Committee, independent contractors have the ability to set their own hours, negotiate their earnings, and select their clients utilizing competing platforms.

However, the system for classifying workers under the FLSA was created over 82 years ago in response to the Great Depression and has fallen woefully short of meeting the requirements of a modern workforce. Mandating all workers to be classified as employees, as proposed by Congressional Democrats, would expose businesses to increased risk of operational burdens and litigation, while resulting in reduced opportunity for workers and higher priced goods for consumers. Individuals classified as employees lack the ability to set their own hours, are subject to rigid schedules, and have capped earnings potential in comparison to the entrepreneurial opportunities offered to an independent contractor.

A 2019 study by Edelman Intelligence, Upwork, and the Freelancers Union found that nearly half of the 6,000 respondents chose freelancing because their personal circumstances made traditional full-time employment impossible, with more than 70 percent crediting flexible

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<sup>2</sup> *Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & Lab.*, 116th Cong. (2019) (testimony of Alexander J. Passantino, Partner, Seyfarth Shaw LLP).

scheduling as their reason for freelancing.<sup>3</sup> The Heritage Foundation’s Rachel Greszler expanded upon this prioritization of flexibility in testimony to the Committee in 2019:

[T]he overwhelming majority of [independent contractors] have chosen independent work precisely *because* they do not want the restrictions that come along with traditional employment. Moreover, many of these workers already have the benefits of traditional employment, either through their own work or through a family member’s. Only 16 percent of gig-economy works rely on the gig platform for their main job.... Stripping workers of options that offer autonomy and flexibility would particularly hurt less advantaged workers, such as single parents and individuals with disability, who need accommodating schedules and greater autonomy.<sup>4</sup>

We are encouraged by DOL’s NPRM in that it attempts to preserve the flexibility inherent in the independent contractor model and we recommend that the final rule allow additional opportunities for workers to set schedules that meet their immediate and future needs as well as those of their families.

### California ABC Test

In contrast to the commonsense rulemaking approach under consideration by DOL, California upended more than 30 years of precedent by codifying the “ABC” test in Assembly Bill 5 (AB 5) last year. The California Supreme Court articulated the ABC test in its 2018 *Dynamex* decision.<sup>5</sup> The *Dynamex* ABC test states that in order to be classified as an independent contractor, the worker must meet the following criteria: a) be “free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact”; b) “perform[] work that is outside the usual course of the hiring entity’s business”; and, c) “customarily engage[] in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.”<sup>6</sup>

As highlighted in a report from the Littler Workforce Policy Institute, the *Dynamex* ABC test imposes an unworkable regulatory framework on workers and employers:

[W]hat is the “usual course of business” of a retail store? The court does not say, and it is not defined anywhere in the opinion. If we do not know what that business is, how can anyone know whether a service is or is not in the usual course of such business? The answer, presumably, is we just assume we know or get to guess based on the description “retail store” that its business is “selling” some kind of tangible goods.... [W]hat is telling from the court’s bare and

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<sup>3</sup> UPWORK, FREELANCING IN AMERICA 2019 (Aug. 8, 2019).

<sup>4</sup> *The Future of Work: Preserving Worker Protections in the Modern Economy: Hearing Before the Subcomms. on Workforce Protections & Health, Emp., Lab., & Pensions of the H. Comm. on Educ. & Lab.*, 116th Cong. (2019) (statement of Rachel Greszler, Research Fellow in Econ., Budget & Entitlements, The Heritage Found.).

<sup>5</sup> *Dynamex Operations West, Inc. v. Superior Ct.*, 416 P.3d 1 (Cal. 2018).

<sup>6</sup> *Id.* at 7.

incomplete examples is not what it says, but everything the court chooses to omit that could make the question difficult to answer. By failing to address any complex, modern, real-world examples, the court leaves unanswered several critical questions and provides little meaningful direction for courts, agencies, businesses, or workers.<sup>7</sup>

While California's AB 5 codifies the *Dynamex* ABC test in roughly 130 words, the law also includes over 3,400 words exempting specific jobs and industries, including insurance agents, physicians, lawyers, investment advisors, and cosmetologists among many others, illustrating the ABC test's destructive weaknesses and lack of compatibility with diverse economic sectors.<sup>8</sup> Rather than setting a dependable and workable standard, the AB 5 framework results in arbitrary treatment of industries based on political considerations to the detriment of workers. For example, the original requirements of AB 5 limited freelance journalists to 35 content submissions to a particular media outlet per year,<sup>9</sup> while placing no similar limits on other creative writing-based industries such as marketing—creating an arbitrary standard based on written content rather than the duties of a job with disturbing implications for freedom of speech. Due to an understandable outcry from California constituents, the Democrat-led California legislature was forced to enact an additional round of exemptions less than a year after the enactment of AB 5 for individuals who contract on single-engagement events, individual proprietor referral agencies, and a host of professional services.<sup>10</sup>

Alexander M. Chemers of Ogletree Deakins highlighted a need for a more responsible approach in his testimony before the Subcommittee on Workforce Protections in 2019:

We also need to offer a path for the many businesses who utilize genuine independent contractors. This is not only important to the businesses that rely on independent contractors, but to the independent contractors themselves (many of them small business owners), who need flexibility to grow their own businesses and to provide their services outside the confines of a traditional employer/employee relationship. Legislation premised on the belief that all or nearly all independent contractors are misclassified is, in my view, a mistake, as are bills that seek to effectively outlaw the use of independent contractors, including California's recently passed Assembly Bill 5.<sup>11</sup>

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<sup>7</sup> BRUCE SARCHET ET. AL., AB 5: THE GREAT CALIFORNIA EMPLOYMENT EXPERIMENT—A LITTLER WORKPLACE POLICY INSTITUTE REPORT (Aug. 8, 2019).

<sup>8</sup> See 2019 Cal. Assemb. Bill No. 5, § 2750.3.

<sup>9</sup> *Id.*

<sup>10</sup> See 2020 Cal. Assemb. Bill No. 2257.

<sup>11</sup> *Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & Lab.*, 116th Cong. (2019) (statement of Alexander Chemers, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart, P.S.).

## Democrat Legislation in Congress

Despite the demonstrated consequences of adopting an overly inclusive and ill-defined worker classification standard, Democrats in the U.S. House of Representatives irresponsibly included the *Dynamex ABC* test in H.R. 2474, the *Protecting the Right to Organize Act*, as part of their efforts to overturn the fundamental foundation of the *National Labor Relations Act*.<sup>12</sup> This radical legislation was passed by the House on February 6, 2020 and was supported by 219 Democrat members. Additionally, Rep. Rosa DeLauro (D-CT) and Sen. Patty Murray (D-WA) recently introduced similar legislation to expand this same test across federal labor law, including the FLSA.<sup>13</sup> These bills would apply the *Dynamex ABC* test nationwide without any of the carve-outs adopted by the California Assembly following a public outcry. Mandating the ABC test at the federal level would subject all workers and businesses in the United States to needless coercion and red tape, resulting not only in tremendous disruption to the economy but also a loss of opportunity and economic mobility. We commend DOL for avoiding this unsound approach in the proposed rule.

## Conclusion

DOL plays a vital role in promoting the welfare of workers and advancing opportunities for profitable and sustainable employment. We urge DOL to continue its determined pursuit of a forward-looking legal and regulatory environment that works best for all workers and businesses, ensuring that the U.S. economy remains an engine of growth, opportunity, and prosperity for all Americans. We commend DOL for taking another step in this direction with the NPRM on independent contractor status and urge that a final rule be issued expeditiously after careful review of public comments. Thank you for your consideration of our views.

Respectfully submitted,



Rep. Virginia Foxx  
Ranking Member



Rep. Bradley Byrne  
Ranking Member  
Subcommittee on Workforce Protections



David P. Roe, M.D.  
Member of Congress

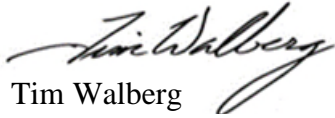


Glenn "GT" Thompson  
Member of Congress

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<sup>12</sup> H.R. 2474, 116th Cong. § 4(a)(2) (2019).

<sup>13</sup> See H.R. 8375 and S. 4738, 116th Cong. (2020).



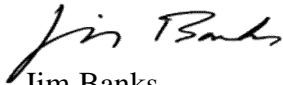
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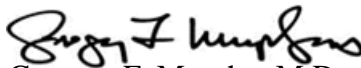
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